touch with business realities and would keep the bank waiting for a payment which both the borrowers and the guarantors intended it should have while protracted proceedings in the alleged counterclaims were litigated; although the court had a discretion to grant a stay such discretion should rarely if ever be exercised; there was no ground for granting a stay and the bank's appeal would be allowed.

We would adopt a similar approach to the facts of this case.

For the reasons we have stated, the appellants are entitled to leave to sign final judgment on the sums claimed against all the respondents. We would accordingly allow the appeal, set aside the order of the learned judge with costs here and below. The order of the senior assistant registrar in respect of the sums payable by the respondents and interest thereon is hereby restored and such sums shall be paid into the High Court at Kuala Lumpur within 30 days of this order and thereafter to await the directions of the Controller of Foreign Exchange as to its disposal or such further order as the High Court may direct. The order for stay of execution is hereby set aside with liberty to the respondents to prosecute the counterclaim. The deposit to be refunded to the appellants.

Appeal allowed.

Solicitors: *Skrine & Co; Chooi & Co; Adnan Sundra & Low.*

Reported by *Prof Ahmad Ibrahim*

Marappan & Anor v Siti Rahmah bte Ibrahim

SUPREME COURT (KUALA LUMPUR) — CIVIL APPEAL NO 563 OF 1988
HASHIM YEOP A SANI CJ (MALAYA), HARUN HASHIM AND GUNN CHIT TUAN SCJJ
4 OCTOBER 1989

Damages (Personal Injury or Death) — Road accident — Brain injuries — Complete paralysis of four limbs — Damages for pain and suffering, loss of amenities, cost of future support and loss of future earnings — Cost of caring for paralysed person at home — Whether allowances for being trained as a teacher was earnings — Award of multiplier — Use of direct multiplier rather than annuity tables — Deduction of living expenses — Civil Law Act 1956, s 28A(2)

In this case, the respondent was involved in an accident whilst she was riding a bicycle. She was knocked down by a motor car driven by the first appellant who was a servant of the second appellant. She suffered severe head injuries with contusion of the brain and fracture of the skull resulting in complete paralysis of all her four limbs. Liability for the accident was agreed to by the parties at 35% against the respondents and 65% against the appellant. The dispute was as to the question of the quantum of damages. The learned trial judge assessed general damages for pain and suffering and loss of amenities at the sum of $180,000; cost of future care at the sum of $67,200, future loss of earnings at the sum of $66,240 and special damages at the sum of $8,695. [See 1989 BLD [May] 643.] The appellants appealed. It was argued that (a) the award of $350 pm by the learned judge for the cost of caring for the respondent at home was unreasonable and manifestly excessive and not in accordance with the trend of previous awards; (b) the learned judge had misdirected himself in concluding that the sum of $345 pm received by the respondent as an allowance for being trained as a teacher was earnings for the purposes of s 28A(c)(i) of the Civil Law Act 1956; (c) the learned judge had misdirected himself in that he had awarded a multiplier of 16 despite the fact that both counsel for the parties had agreed and applied to him to record a multiplier of 15; (d) the learned judge had misdirected himself in holding that the usage of the annuity tables in this country was more a matter of practice than of law; and (e) that the learned judge had misdirected himself when he failed to take into account the living expenses of the respondent.

Held, dismissing the appeal:

(1) The learned judge was correct in holding that the item for care and nursing was justifiable and should not be any the less if the person concerned was looked after at home instead of in an institution as it is now settled that compensation can be given in money for services rendered by parents. The learned judge was justified in making the award of $350 pm for this item as the respondent was paralysed and needed care and nursing all the time.

(2) The training undertaken by the respondent to enable her to become a teacher was an activity which resulted in a gain of $345 pm for her and this sum of money was therefore earnings contemplated by s 28A(2)(c)(i) of the Civil Law Act 1956.

(3) In view of the provisions of s 28A(2)(d) of the Civil Law Act 1956, the learned judge was right in awarding a multiplier of 16 in this case.

(4) The learned judge had not misdirected himself in applying the direct multiplier rather than using the annuity tables in calculating the award of damages for the cost of future care and loss of future earnings in this case.

(5) There was no proof or admission as to what was the actual living expenses of the respondent at the time she was injured and therefore the learned judge rightly did not make any deduction for living expenses.

Cases referred to

1 *Taylor* v *Bristol Omnibus Co* [1975] 2 All ER 1107 (folld)
2 *Penn* v *Spiers & Pond Ltd* [1908] 1 KB 766 (refd)
3 *Great Western Ry Co* v *Helps* [1918] AC 141 (refd)

Legislation referred to

Civil Law Act 1956 s 28A(2)

Appeal from: Civil Suit No 25-320-87 (High Court, Ipoh)

VT Singam for the appellants.
Chan Shick Chin (*Toh Chin Chong* with him) for the respondent.

Cur Adv Vult

Gunn Chit Tuan SCJ: The plaintiff, Siti Rahmah bte Ibrahim, who was then 23 years old, was involved in an accident at Jalan Besar, Tanjong Malim, on 12 October 1986, at about 8.30pm whilst she was riding a bicycle. She was knocked down by a motor car driven by Marappan a/l Nallan Koundar, the first defendant, who was a servant and/or agent of Ramasamy a/l Sivamalla Kavnalaan, the second defendant. She suffered severe head injuries with contusion of the brain and fracture of the right fronto-parietal bone of the skull resulting in complete paralysis in all her four limbs. Liability for the accident was agreed to by the parties at 35% against the defendants and 65% against the plaintiff. Submissions in the High Court were therefore confined to the question of the quantum of damages. After hearing the evidence and submissions of counsel the learned judge assessed general damages for pain and suffering and loss of amenities at the sum of $180,000; cost of future care at the sum of $67,200; future loss of earnings at the sum of $66,240 and special damages at the sum of $8,695. He therefore ordered that judgment be entered for the plaintiff against the defendants as follows:

(a) $63,000 (ie 35% of $180,000) being general damages for pain and suffering including loss of amenities together with interest thereon at the rate of 8% pa from the date of the service of the writ (ie 17 September 1987) until the date of judgment;
(b) $23,520 (ie 35% of $67,200) being cost of future care and nursing;
(c) $23,184 (ie 35% of $66,240) being future loss of earnings;
(d) $3,582.25 (ie 35% of $10,235) being special damages together with interest thereon at the rate of 4% pa from the date of the accident (ie 12 October 1986) until the date of judgment;

and it was further ordered that the party and party costs of the suit be taxed and be paid by the defendants to the plaintiff and/or her solicitors.

The defendants appealed against the decision of the awards on quantum and the first ground of appeal was that the award of $350 pm by the learned judge for the cost of caring for the plaintiff at home was unreasonable and manifestly excessive and not in accordance with the trend of previous awards. Mr VT Singam, counsel for the defendants, contended that there was no evidence to support the order for the said award. He referred to the evidence of Safaraton binti Dahlan (PW3), the mother of the plaintiff, who told the court that the plaintiff was severely injured in the accident and was paralysed. She has been looking after her since the accident together with the plaintiff's younger sister and father. She said that after the death of her husband and herself someone would have to be hired to look after her and estimated that $800 pm would be needed to hire someone to look after her because she has to be fed and bathed and the person looking after her has to throw away her urine etc. That, she said, was a full-time job.

As for the cost of care, the learned judge found that as PW3 did not actually engage anyone to look after the plaintiff, her estimate of the cost of caring at $800 pm was most speculative. He also considered that there was no necessity to consider the cost of sending the plaintiff to a nursing home as all along she had been looked after by PW3. The learned judge, however, referred to *Taylor* v *Bristol Omnibus Co*[1] in which the English Court of Appeal has held that the item for care and nursing was justifiable and should not be any less if the plaintiff was looked after at home instead of in an institution, as it is now settled that compensation can be given in money for services rendered by parents. As the local cases cited to him had given awards ranging from $150 to $350 pm for this item and in the light of inflation the learned judge considered that an award of $350 pm to be fair and adequate for the cost of caring for the plaintiff at home. Before us, counsel submitted that $250 pm should be sufficient but we agreed with the learned judged that in the circumstances of this case the award for this item should be $350pm as the plaintiff was paralysed and needed care and nursing all the time.

For the second ground of appeal, counsel referred to the following s 28A(2)(c) of the Civil Law Act 1956 ('the Act'):

> ... in awarding damages for loss of future earnings the court shall take into account —
>
> (i) that in the case of a plaintiff who has attained the age of fifty five years or above at the time when he was injured, no damages for such loss shall be awarded; and in any other case, damages for such loss shall not be awarded unless it is proved or admitted that the plaintiff was in good health but for the injury and was receiving earnings by his own labour or other gainful activity before he was injured;
> (ii) only the amount relating to his earnings as aforesaid at the time when he was injured and the court shall not take

into account any prospect of the earnings as aforesaid being increased at some time in the future;

(iii) any diminution of any such amount as aforesaid by such sum as is proved or admitted to be the living expenses of the plaintiff at the time when he was injured;

and submitted that the learned judge had misdirected himself in concluding that a sum of $345 pm received by the plaintiff as an allowance was earnings under the above-quoted s 28A(2)(c)(i) of the Act. Counsel for the defendants had argued that in the instant case, the plaintiff was receiving $345 a month as allowance for being trained as a teacher and was therefore not receiving earnings by her labour or other gainful activity. He contended that an allowance was not 'earnings' but only incidental thereto and likened it to a waiter getting tips. He also gave examples of 'gainful activity' by persons being engaged as musicians or karate instructors. The learned judge was, however, of the view that an allowance, even if it was incidental to earnings, would be part of it and could be considered such. He disagreed with the submission of counsel and held that a teacher undergoing training could be considered to be engaged in gainful activity just like a musician or a karate instructor. He preferred the analogy stated by counsel for the plaintiff who compared the plaintiff's position with that of a law pupil in chambers, and therefore concluded that the $345 pm allowance given to the plaintiff at the time of the accident fell within the purview of the said section. Here we might mention that the English Court of Appeal has in *Penn* v *Spiers & Pond Ltd*,[2] in construing a provision in Sch 1 of the English Workmen's Compensation Act 1906, has held that a waiter's tips were part of his earnings. That case was followed by the House of Lords in *Great Western Ry Co* v *Helps*[3] in which it was held that tips received by a railway porter were part of his earnings for the purpose of assessing compensation payable under the English Workmen's Compensation Act 1906. We agreed with both the learned judge and counsel that in construing the above-quoted s 28A(2)(c)(i), the expression 'earnings' must in this case be read together with the words 'or other gainful activity'. We think that the expression 'earnings' in that subsection of s 28A of the Act was used not in the sense in which economical writers use it, but in a popular sense. We therefore considered that the training undertaken by the plaintiff to enable her to become a teacher was an activity which resulted in a gain of $345 pm for her and this sum of money was therefore earnings contemplated by that section.

The next ground of appeal was that the learned judge had misdirected himself in that he had awarded a multiplier of 16 despite the fact that both counsel for the plaintiff and the defendants had agreed and applied to him to record a multiplier of 15. The legislature has made its intention very clear by using mandatory language in s 28A(2)(d) of the Act that 'in assessing damages for loss of future earnings of court *shall* take into account that in the case of a person who was of the age of thirty years or below at the time when he was injured, the number of years' purchase *shall* be 16'. The learned judge was therefore right in awarding a multiplier of 16 in this case.

In the fourth and fifth grounds of appeal the appellants stated that the learned judge had misdirected himself that the usage of the annuity tables in this country was more a matter of practice than of law. It was submitted by counsel that the learned judge ought to have applied the annuity tables in calculating the award of damages in accordance with the trend of previous awards and had misdirected himself in holding that the direct multiplier should apply to the case of the plaintiff 'as contingencies and the lump sum payment had been taken care of by the amendment as to the set multiplier'. In the event, the learned judge had awarded $350x12x16 amounting to $67,200 for the cost of future care and $345x12x16 totalling $66,240 for future loss of earnings. Counsel's contention was that s 28A of the Civil Law Act 1956, relating to damages in respect of personal injury, has not referred to the annuity tables which have been used in this country as a matter of practice for a long time. He submitted that the annuity tables have not been 'repealed' and should therefore still be used in calculating the award of damages in accordance with the trend of previous awards. We rejected that submission of counsel because there is no need of any legislation to repeal what was a matter of practice, and considered that the learned judge had not misdirected himself in applying the direct multiplier rather than using the annuity tables in calculating the award of damages for the cost of future care and loss of future earnings in this case.

The final ground of appeal was that the learned judge had misdirected himself when he failed to take into account or deduct the living expenses of the respondent as required under the above-quoted s 28A(2)(c)(iii) of the Act.

On this ground we also agreed with the learned judge that the court should not make any deduction for living expenses under that subsection of s 28A of the Act as there was no proof or admission in this case as to what the actual living expenses of the plaintiff were at the time when she was injured. In the circumstances of this case and for the reasons stated we therefore dismissed the appeal with costs and ordered that the deposit of $500 be paid to the plaintiff on account of taxed costs.

Appeal dismissed.

Solicitors: *Daim & Gamany; Murphy & Dunbar.*

Reported by *Prof Ahmad Ibrahim*